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LIABILITY OF MORTGAGEE, UNDER DEED ABSOLUTE IN FORM, FOR CONVEYANCE OF PROPERTY TO THIRD PERSON.

It is well settled that a deed conveying land, which is absolute and unconditional on its face, but which the parties intend to be merely security for the payment of a debt or for the performance of some other promise, can be shown by parol evidence in equity to be a mortgage. Equity will then treat the deed merely as a mortgage, and will give to the parties thereto only the relative rights and remedies of mortgagor and mortgagee (O'Dell v. Montross, 68 N. Y., 499).

Where an absolute conveyance of lands is designed as a mortgage, it will retain its character in the hands of each subsequent purchaser who takes the property with notice of the rights of the parties; and therefore if a purchaser from the original grantee had knowledge of the nature of the original transaction, or knowledge of facts sufficient to put him upon inquiry, he cannot claim to be the unconditional owner of the estate, but the mortgagor will have the same right to redeem from him as from the original grantee. But where a third person has in good faith purchased the property from the grantee in the original deed, for a valuable consideration, relying on the apparently perfect legal title of his vendor, and without any notice, actual or constructive, of the agreement or understanding between the original parties, he takes an indefeasible title, and as against him the original grantor has no right of redemption. Where a third person thus acquires an irredeemable title to the land, the remedy of the original grantor is by action against his grantee, for a breach of his legal duty by the latter, in dealing as absolute owner with property which was only conveyed to him by way of pledge (27 Cyc. 1032-1033).

To discover what the intention of the parties was and whether the deed was intended as an absolute conveyance, a conditional sale or a mortgage, equity will inquire into all the circumstances surrounding the transaction, into their preceding negotiations, into the consideration and into all material facts which will help to determine the true nature of the instrument (Whittemore v. Fisher, 132 Ill., 243). Thus the existence of a debt between the apparent grantor and grantee (Locke v. Moulton, 96 Cal., 21); the inadequacy of price paid for the apparent conveyance (Rodgers v. Moore, 88 Ga., 88); the fact that the apparent grantor in the deed at the time of its execution was sorely pressed for money and therefore at the mercy of his creditor (Steel v. Black, 56 N. C., 427); the retention of the possession of the supposedly conveyed premises by the grantor in the deed (Luesenhop v. Einsfeld, 93 A. D., 68) are all evidence tending to prove that the deed, absolute on its face, was in fact intended as a mortgage. If the court determined from all the evidence that it was the intention of the parties that the deed was to be given only as security, this intention governs (Shields v. Russel, 142 N. Y., 290).

Since deeds and written contracts in general are deemed to express the true intention of the parties, very clear and convincing evidence is necessary for a party, alleging that a deed absolute in form is in fact a mortgage to succeed (Kellogg v. Northrup, 115 Mich. 327).

The grantor's remedy is in damages against the grantee for a breach of his equitable duty in having conveyed the premises to which, as between the parties, it was intended that he hold title only as mortgagee. The reasons for allowing a party to show that a deed, absolute in form,

is in fact a mortgage, being equitable, in most states parol evidence is inadmissible at law to show this fact (Benton v. Jones, 8 Conn. 186; contra, Jackson v. Lodge, 36 Cal. 28).

In the recent case of Harris v. Barnes City Sav. Bank (188 N. W. 862), the plaintiff had mortgaged certain land to the defendant and had subsequently given to him a quitclaim deed. The defendant thereafter conveyed the premises to a third party. The plaintiff then brought this action for damages, alleging that the conveyance had been a breach of duty upon the part of the defendant inasmuch as the quitclaim deed had only been intended as a mortgage. The Supreme Court of Iowa correctly held that the quitclaim deed, having been given by a mortgagor to a mortgagee, the transaction would be looked upon with suspicion. Although the action was at law the court held that the plaintiff could show by parol evidence that the quitclaim deed was in fact intended as a mortgage, and that, if it were, the plaintiff would be entitled to recover as damages the reasonable value of the land at the date of the conveyance by the defendant, less the amount of the debt owned to the defendant.

DID HE COLLECT?

Senator Frank B. Kellogg, of Minnesota, says an honest old blacksmith in his State who had endeavored for many months to collect a bill from a customer, finally agreed to take a note for the amount. The debtor suggested going to a lawyer to have the instrument drawn up, but the man of the anvil, who had been sheriff years before, said he knew enough about law to draw up such a paper, and laboriously wrote out the following:

"On the first day of June I promise to pay Louis Warner the sum of seventeen dollars and forty-five cents, and if said note be not paid on the date aforesaid, then this instrument is to be null and void and of no effect. Witness my hand, etc."—Chicago Legal News.

NOTES OF IMPORTANT DECISIONS

LIABILITY OF UNDISCLOSED PRINCIPAL —APPLICATION OF THE PAROL EVIDENCE RULE.—It has been said that since the contract is entered into between the agent and the plaintiff and since the defendant is in nowise a party to said written agreement, the rule excluding parol evidence prevents the plaintiff from holding the defendant, even conceding that the defendant was the principal.

That this, however, is un ound is apparent from the language of Andrews, J., in Coleman v. First National Bank of Elmira (53 N. Y., 388, p. 393):

"The rule (parol evidence rule) does not preclude a party who has entered into a written contract with an agent from maintaining an action against the principal upon parol proof that the contract was made in fact for the principal * * * and such proof does not contradict the written contract. It super-adds a liability against the principal to that existing against the agent. That parol evidence may be introduced in such a case to charge the principal, while it would be inadmissible to discharge the agent, is well settled by authority (Ford v. Williams, 21 How., U. S., 207; Higgins v. Senior, 8 M. & W., 834; Parker, J., Short v. Spoakman, 2 B. & Ad., 962; Tainton v. Prendergast, 3 Hill, 72; Gates v. Brower, 9 N. Y., 205).

"It is now settled law that the admission of parol evidence to show that a written contract made in the name of the agent was in fact made in behalf of an undisclosed or, if disclosed, unnamed principal, does not violate the rule against the admission of parol evidence to vary the terms of a written contract. Whatever the original merits of a rule that a party not mentioned in a simple contract in writing may be charged as principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signer, we cannot reopen it, for it is as well settled as any part of the Law of Agency. And this rule extends to contracts required by the Statute of Frauds to be in writing."

See, also, Ford v. Williams (21 How., U. S., 287), Huntington v. Knox (7 Cush., Mass., 371), Land Co. v. Levy (76 Minn., 364), Byington v. Simpson (134 Mass., 169), Lerned v. Johns (9 Allen, Mass., 419) and Kingsley v. Siebrecht (92 Me., 22).

Possibly the best exposition of this rule is found in the opinion of the United States Supreme Court in Ford v. Williams (supra):

"The contract of the agent is the contract of the principal, and he may sue or be sued thereon though not named therein. Notwithstanding the rule of law that an agreement reduced to writing may not be varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him."

The rule is otherwise, however, where the contract between the third party and the agent is under seal. In such a case, unless the seal is merely superfluous, the third party may only hold the agent and cannot hold the undisclosed principal. This proceeds from the strict rule of the common law that only the parties named or described in a sealed instrument can sue or be sued upon it (Briggs v. Partridge, 64 N. Y., 357).

Even where the contract is under seal, however, it would seem that where the principal has accepted its benefits or has been unjustly enriched at the third party's expense or has ratified, he may be held liable (Briggs v. Partridge, supra; Nash v. Tourne, 72 U. S., 703; Salmon Falls, &c., Co. v. Goddard, 55 U. S., 446).—New York Law Journal.

RIGHT OF DEPOSITOR GIVING OWN CHECK FOR CASHIER'S CHECK TO RECOVER FROM SAID GUARANTY FUND ON INSOLVENCY OF BANK.—Where a depositor had an open, unsecured, noninterest-bearing account in a bank, and in exchange for the bank's cashier's check, he made and delivered to the bank his own check on his deposit for a like amount, it was held that a cashier's check being in its legal effect the same as a certificate of deposit or certified check, the depositor could recover the amount of the cashier's check, where the bank was declared insolvent, out of a guaranty fund created under the banking laws of the State. Middlekauff v. Banking Board, Texas, 242 S. W. 442. The following is quoted from the opinion of the Court:

"The transaction between relator and the bank negatives an intent by either party for the cashier's check to wipe out the bank's debt. Relator had put his money in the bank for safekeeping, being entitled to rely on the security afforded by the guaranty fund. He chose not to have the bank pay him $3,000, on his check, in discharge of its obligation in that amount. He sought to avoid the risk of carrying that much money on his person. He did not care to substitute another debtor for the bank. We cannot reasonably attribute to him the purpose to merely weaken his security. The certificates for relator's deposits, whether on slips or in a passbook, evidenced that he had an unsecured, noninterest-bearing debt against the bank, payable to him or his order on demand, for his unchecked and unpaid balance. The cashier's check evidenced the same obligation, save it specified the balance, and, in ordinary course, it would have enabled relator to utilize his balance with more facility. Had relator had his own $3,000 check certified, or had he taken the bank's formal certificate of deposit for that amount, no one could maintain that he meant such negotiable paper to extinguish the bank's liability to him as a depositor. Yet it seems plain enough that we can ascribe no different intention to the parties with respect to discharge of bank's obligation, supported by the guaranty fund, than if their transaction had been consummated by means of formal certificate of deposit or by certified check. 5 R. C. L. 483, 484; Walker v. Sellers, 201 Ala. 189, 77 South. 715.

Referring to a cashier's check, which a depositor of a bank obtained by having the amount of the check entered on his passbook as a payment to him, the Supreme Court of Illinois said:

"The check was not drawn by a depositor, * * * but was simply an acknowledgment of an indebtedness on the part of the bank to the payee of the order. As between the bank and appellant [the payee] it was, in legal effect, the same as a certificate of deposit or a certified check." Clark v. Chicago Title & Trust Co., 186 Ill. 444, 57 N. E. 1061, 53 L. R. A. 232, 78 Am. St. Rep. 294; Id., 85 Ill. App. 295.

To the same effect, see Lummus Cotton Gin Co. v. Walker, Supt., 195 Ala. 555, 70 South. 754.

Relator's check for $3,000 against his deposit has not been paid. He drew the check to get $3,000, not at that moment, but when he or his transferee might choose to present the cashier's check. The cashier's check was but the vehicle by which the payment of relator's check was to be accomplished. Upon the dishonor of the bank's check, relator's deposit stands as though he had never drawn his own $3,000 check, nor received the bank's worthless check. Western Brass Mfg. Co. v. Maverick, 4 Tex. Civ. App. 535, 23 S. W. 728; Anderson v. Owen, 112 Miss. 476, 73 South. 286; Bank of Greenville v. Kretschmar, 91 Miss. 615, 44 South. 930.

We are not inclined to hold that a cashier's check will ordinarily draw interest in advance of its presentment for payment. The essential understanding of the parties is that the principal only is to be paid whenever the holder may elect to present the check for payment. Duncan v. Magette 25 Tex. 248. However, having held that relator could repudiate the check, on the bank's insolvency, as he did, it is not necessary for us to determine the question.

Since it plainly appears that the transaction between relator and the bank did not discharge the bank's obligation to relator as a general depositor, entitled to the benefits of the guaranty fund, such transaction presents no obstacle to his maintenance of this suit."

BAKER HELD TO BE A MANUFACTURER.—In the case of State v. Lanasa, 92 So. 306, the Supreme Court of Louisiana holds that a baker, in whose establishment the various processes are conducted by electrically driven machinery, is a manufacturer, within the meaning of a constitutional provision exempting manufacturers from a license tax. We quote from the opinion of the Court as follows:

"The mechanical process of sifting, mixing, and manipulating the flour and other ingredients, all of which was done by electrically driven machinery, and the conversion of the combined ingredients into the finished product, is described, substantially, like the process that was declared "manufacturing" in the case of State v. American Biscuit Manufacturing Co., 47 La. Ann. 160, 16 South. 750. The only difference is that the American Biscuit Manufacturing Company manufactured various kinds of biscuits, crackers, and Italian paste; whereas, the defendant in this case manufactured only bread. In State v. Eckendorf, 46 La. Ann. 131, 14 South. 518, it was held that one who baked and sold bread, on a comparatively small scale, was not a manufacturer. And so, in City of New Orleans v. Mannessier, 32 La. Ann. 1075, it was held that one who made and sold ice cream was not a manufacturer. But, 36 years later, in State Tax Collector v. Brown, 140 La. 928, 74 South. 253, we held that one who made ice cream on a large scale and by machinery was a manufacturer.

"Without observing a distinction in law between the making of bread and the making of biscuits, we cannot distinguish this case from that of the American Biscuit Manufacturing Company. Such a distinction does not result from the fact—if it is a fact—that biscuit making is a more complex process than bread making or that the biscuit manufacturers make more, and the bread manufacturers make less, than 57 varieties. For we have decided that coopers, making only such simple articles as barrels and hogsheads, are manufacturers. See City of New Orleans v. Le Blanc, 34 La. Ann. 596. And we have decided that the making of burlap bags, a process consisting merely of cutting the manufactured fabric into standard sizes, folding each piece once and sewing together the edges on two sides, is manufacturing. See State v. Bemis Bag Co., 135 La. 398, 65 South. 554."

ONE SELLING SECONDHAND AUTOMOBILE WITHOUT EXECUTING BILL OF SALE AND TRANSFER TAX RECEIPT, CANNOT RECOVER ON THE PURCHASE MONEY-NOTE.—The case of Foster v. Beall, 242 S. W. 1117, decided by the Court of Civil Appeals of Texas, holds that when one sells a secondhand automobile without executing a bill of sale, and transferring the license fee receipt, as required by statute, he cannot recover on a purchase money-note given for the machine, although he innocently neglected to comply with the statute, and subsequent tendered full compliance. The case goes further and holds that the purchaser in such circumstances cannot tender back the machine and recover the amount paid because of the seller's failure to comply with the statute. Regarding the above-mentioned points, the Court in part said:

"The statute quoted above was enacted, not simply for the purpose of regulating the transfer of the title to personal property, but as a method of suppressing automobile thefts, compliance with that law is not a formality which the parties may waive. The general public has an interest in its observance. When the appellee sold and delivered the car to the appellant without executing and delivering the necessary papers, he committed a penal offense, punishable by a fine. He knowingly did that which the law said he should not do. His alleged good intentions did not excuse him. He is charged with a knowledge of those legal requirements, and he knew that he had not performed them. He made no attempt to perform them till after this suit was filed, and after the sale had been repudiated by the purchaser. The law is mandatory, and cannot be evaded by innocent neglect. Overland Sales Co. v. Pierce (Tex. Civ. App.) 225 S. W. 284; Goode v. Martinez (Tex. Civ. App.) 237 S. W. 576. It is the fact of failure to comply with the statutory requirements, and not the evil intent, that constitutes the offense.

The courts will not enforce illegal contracts, but will leave the parties just where they have placed themselves. Wiggins v. Bisso, 92 Tex. 219, 47 S. W. 637, 71 Am. St. Rep. 837; Seeligson v. Lewis, 65 Tex. 215, 57 Am. Rep. 593. The judgment will therefore be reversed, and judgment here rendered that the appellee take nothing by his suit on the note. For the same reason the appellant is not entitled to the relief sought in his cross-action."

OWNER PERMITTING BEGINNER TO DRIVE AUTOMOBILE AS ACT OF NEGLIGENCE.—In the case of Wilson v. Brauer, 117 Atl. 699, decided by the Court of Errors and Appeals of New Jersey, there was evidence tending to show that the owner of an automobile expressly authorized a beginner who had no driver's permit, and who, to the knowledge of the owner, knew nothing of the operation of an automobile, to run it upon the streets of a populous city for the purpose of learning how to operate it. It was held that the liability of the owner for injury to a pedestrian caused by the operator's want of knowledge and skill, was a question for the jury. A portion of the opinion by Trenchard, J., follows:

"Of course it is quite true, as a general rule, that the owner of an automobile is not liable for an injury resulting from its operation by another, unless the person operating it is one for whose act the owner is responsible under the doctrine of respondeat superior. But this case does not depend entirely upon the application of that doctrine. Where, as here, the owner of an automobile expressly authorizes a beginner, who had no driver's permit, and who, to the knowledge of the owner, knows nothing of the operation of an automobile, to run it upon the streets of a populous city for the purpose of learning how to operate it, he may be responsible for an injury to a pedestrian caused by the operator's want of knowledge and skill. The liability of the owner would

rest, not alone upon the fact of ownership, but upon the combined negligence of the owner and driver, negligence of the one in authorizing the performance of a highly dangerous act with the machine, and of the other in its operation.

"The underlying principle of the rule is stated in Van Winkle v. American Steam Boiler Co., 52 N. J. Law, 247, 19 Atl. 475, thus:

" 'In all cases in which any person undertakes (or authorizes) the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill.'

"It is true, we believe, that automobiles are not generally held to be dangerous instrumentalities per se. Certainly, when carefully and intelligently handled, they are not usually dangerous to other persons using public highways with due care. But their great power, weight, and speed endow them with dangerous potentialities, and, when not handled carefully by competent persons, they become, under certain conditions, highly dangerous instrumentalities and a public menace, as this case illustrates.

"No one will deny that an automobile in the hands of a person having no knowledge of how to drive it would be a dangerous machine to turn loose on busy streets and would constitute a menace to travelers. Now, as we have pointed out, there is evidence in the present case tending to show that the defendant owner expressly authorized his chauffeur to use his car for the purpose of teaching Beck how to drive it. This authorization was given just as his chauffeur was about to take the car from the defendant's home to the garage through a populous part of Jersey City. We think that the jury might fairly infer that the permission was to be presently exercised; that is to say, the authorization was to use the streets in the neighborhood of the defendant's home for the purpose of giving the lesson in driving. The result was that Beck actually ran the car up on the sidewalk and injured the plaintiff. We think that was a result which it was open to the jury to infer that the defendant, in the exercise of due care and foresight, should have anticipated as likely to occur. The motion for a direction of a verdict was therefore properly denied."

THEFT POLICY HELD TO COVER RECTIFIER AS "EQUIPMENT" OF AUTOMOBILE.—A policy insuring an automobile owner against loss by theft, on the body, machinery, and equipment, is held by the Appellate Court of Indiana, in Old Colony Insurance Co. v. Kolmer, 136 N. E. 51, to cover theft of a rectifier used in charging the batteries of the automobile with electric current; the term "equipment" meaning provision of whatever is needed for efficient action or service. We quote from the opinion as follows:

A few illustrations may prove helpful: Most owners of automobiles carry an emergency jack, when on the road, for use in the event of deflated casings. This is certainly a part of the equipment of the automobile. Some owners also have other jacks, which they keep in their garages, with which to raise and support their automobiles from the floor, when left standing for a considerable time. Can it be said with reason that the former is an equipment, while the latter are not, merely because one is carried with the automobile, while the others remain in the garage? Formerly all automobile owners, and even now most of them, carry small hand pumps for the purpose of inflating their casings when on the road. These are evidently a part of the equipment of such automobiles. Some may have larger and more efficient pumps for such purpose, which are not carried in or on their automobiles because of their size. But can it be successfully urged that because of the difference stated, the latter are not a part of the equipment of such automobiles? We are clearly of the opinion that it cannot be done, as to do so would give too much importance to a comparatively immaterial fact. Other illustrations might be drawn from the use of appliances for cleaning and lubricating, but more are unnecessary.

"As we have heretofore noted, the policy does not limit the equipment of the automobile covered thereby to such as may be attached thereto, or carried therein or thereon, or to such as might be so carried in a place provided therefor. To so limit the policy would be to write something into it which was omitted by the insurer when it prepared the same, a thing we are not permitted to do. We attach no importance to the fact that the rectifier was not purchased with the automobile, as a part of its equipment, as an appliance acquired subsequently, if of such a character and so used as to constitute an equipment, would be such notwithstanding that fact. As to the list price of the automobile, and the fact that rectifiers are not used for the sole purpose of charging electric automobiles, it suffices to say that, while such facts would constitute matters proper for the consideration of the trial court in reaching its conclusion, they are not conclusive.

"As bearing on the intention of the parties to the policy in suit, the trial court may have believed that appellant knew, as a matter of common knowledge, that an electric automobile cannot be operated without being charged with electricity, and that many owners of such automobiles had or might have appliances for that purpose, and may have given weight to the fact that, with such knowledge, appellant considered the equipment which it did not desire that the policy should cover, and only eliminated therefrom 'robes, wearing apparel, personal effects, extra bodies, * * * tools and repair equipment,' as therein specifically enumerated. That such was the intention of appellant is a reasonable inference from the facts stated, since the policy was evidently prepared by it, and we must give effect to such inference on appeal."

THE CROSS-EXAMINATION OF THE ALIENIST[1]

JOHN E. LIND, M. D.[2]

The expert in mental disorder is brought into court for a very definite purpose, which is either—depending upon which side calls him—to testify to the responsibility or irresponsibility of a certain person. I shall discuss in this article more particularly the alienist in murder trials. In these the burden of proof rests on the defense. The defendant is presumed sane by the law and to overthrow this assumption his attorneys bring experts in mental disorders into court to testify that he is not responsible. This testimony having been offered, the prosecution combats it either by offering experts of their own to testify to the contrary or by merely refusing to offer any testimony in rebuttal and claiming that the alleged insanity has not been proved.

When considering at all the question of irresponsibility as it affects criminal law, one is tempted to dilate upon many aspects of it, to consider indeed the whole question of responsibility, the trial of mental status by lay juries, the hiring of experts, the method of testifying, and many other points of interest. The scope of this paper will not be so extensive, however, for several seasons. For one thing, it is the writer's opinion that a fair constructive criticism of the present system could only be made by the collaboration of a jurist versed in medical matters with an alienist experienced in the law. Such comment as the writer might be able to offer would only be destructive in nature, would no doubt be unjust in that it would not be informed by comprehensive knowledge and would not have constructive suggestions to offer.

It is, therefore, in no spirit of reform or uplift that the writer ventures to present a few impressions, arduously sweated from him in the hot box known as the witness stand, exposed to the fierce light of public scrutiny, bathed in the sun of the judge's legal knowledge and subjected to the fire of the opposing lawyer.

It is thought these might serve to show how easily the psychiatrist, testifying in a murder trial, may be put in a false position, how difficult it is for him to present his conception of the case to the jury, how skillfully his statements may be emasculated by cross-examination; it may perhaps serve to explain why he goes on the stand feeling that he is testifying in behalf of an irresponsible unfortunate whose mental condition should be taken into account in dealing with him, and leaves the stand wondering whether he has not helped to tighten the noose about his neck.

The first point the writer wishes to touch upon is the danger of bias. The picture which the general public usually forms of insanity as a defense in a murder trial is a series or bewhiskered experts solemnly testifying that the accused is insane, followed by a series of equally hirsute and learned men testifying that he is sane. The natural reaction of the layman is to discount the whole business and no doubt this is what practically happens in the case of many juries. They say among themselves, "Well, three doctors have testified on one side and three on the other. We don't know which to believe. Let's throw this whole insanity business out. The man doesn't look very crazy to us, anyhow." The result is, of course—a man being presumed sane by the law—that the accused loses all the benefit of a doubt as to his mental condition.

Under our present system, it is practically imposible for the most honest alienist to avoid leaning one way or the other. He stands after all in the delicate relation of employed to employer. The lawyer seeks him out especially, thus gratifying his *amour propre,* flatters him by telling of his side's dependence upon him for the

(1) Read before the Washington Society for Nervous and Mental Disease, May 19, 1921.

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strength of the case and finally he pays a good fee for his services. The alienist thus comes into court with a friendly feeling towards the lawyers for the defense together with a sympathy for the accused, and it is small wonder that when attacked by the prosecuting attorney he is inclined to make doubtful statements emphatic and strong ones even stronger. Even those overly conscientious men who fear lest they might be unconsciously prejudiced sometimes show bias in that they may lean too far the other way, which is just as bad. Worse, in fact.

However, let us assume that our protagonist has gotten on the witness stand and, led on by the sympathetic and admiring attitude of the counsel for the defense, has stated his opinion that the accused was of unsound mind at the time the crime was committed. He is then delivered over into the hands of the prosecution.

The scene which follows next is one familiar in all criminal courts. There is the endless wrangling over small points, the endeavor to trap the witness into a contradiction or an admission, the quarrels over definitions, the citations of authority, etc., etc.

The effort of the cross-examination—as the writer has observed it from the less desirable side of the witness box—seems to be divided into two main parts, to discredit the witness and to vitiate his testimony.

The attempt to discredit the expert witness personally is often done only indirectly, but he may be the object of direct attacks under which it is rather difficult to retain one's equanimity. For example, a doctor who had had some experience in mental disorder was a prisoner himself and was called to testify in behalf of the defendant. The prosecutor brought the fact that the doctor himself was a prisoner before the jury by such questions as "Did you occupy the same cell at the jail with the accused"? or "Did you observe the accused when you rode up from the jail in the wagon with him this morning"?

Of course, in the instance cited, the attorney for the defense immediately objected to each question on the ground that it brought indirectly before the jury facts that could not be presented to it directly. This objection was sustained, but the jury became aware that the witness was in bad odor with the community himself, which was, after all, what the prosecution wanted.

The alienist's motives may be brought into question by asking him whether he has been paid for testifying or not and whether he is to get a larger sum if the defendant is acquitted than if he is convicted. (The medical expert, I may remark, parenthetically, should never agree to a contingent fee.)

Or the medical expert may be attacked on the professional side by intimating that his qualifications, which were brought out so grandiloquently by the other side, are not so very much after all. Thus, should he be on the staff of a hospital for mental disorder, the cross-examiner may enlarge upon the fact that he is only second, or third, or fourth on the staff. This he is especially likely to do if, as sometimes happens, one of his own experts should be a member of the same staff and hold a technically higher rating.

The cross-examiner may attempt the direct way of discrediting the alienist's professional attainments by questioning him along the line of his specialty, but this is rather dangerous business, unless the lawyer is especially conversant with psychiatry or the alienist is especially incompetent. The witness saw one physician attempt to qualify as an expert in mental and nervous diseases and when asked to tell what a neuron was and give the number of cranial nerves was unable to do either.

A method more usual is to produce various textbooks in court and ask the witness if he is familiar with them. He should beware how he admits that any one of them is an authority lest a statement be immediately quoted from it opposed to one he himself has made. The writer heard one

exasperated expert declare that hereafter if he has read a text-book cited he will say it is good, but not an authority, but if he has not read it, he will say it is not much good anyway. Or a prosecuting attorney may try to get the witness to answer metaphysical questions, as one asked each opposing expert: "What is the first principle of human knowledge?" and if the doctor said he didn't know, would say, "What, doctor, you claim to be a scientific man and admit you can't tell the first principle of human knowledge?"

Other ways of discrediting the witness are by endeavoring to show that he has not devoted sufficient time to the examination of the accused to form an opinion, that he has neglected to make a physical examination, that he saw him too long after the crime itself, and so on.

These do not exhause the possibilities, but we shall pass on to the attack on the testimony itself. This is made in various ways which we shall endeavor to touch upon at least.

First, let me allude to written memoranda. My own method is to make very few notes at the time I examine a prisoner, noting down briefly only the outstanding symptoms and relying on my memory for my testimony. Many psychiatrists, however, are more meticulous and make detailed notes to which they are prone to refer in court. This always leads to the prosecutor objecting to the consultation of the notes, except to "refresh the memory". If the memory requires too much refreshment, the witness is subject to sarcastic comment. I have seen a lawyer give his own witness opportunity to refer frequently to his notes in the following manner: He would allow him to testify as much as he could from memory and then, when he saw him hesitate, would ask some such question as, "What did his brother-in-law say?" The doctor would not be able to recall without looking at his notes and was advised to "refresh his memory." After looking carefully through several pages of notes, he would say, "Nothing", and continue his testimony with his memory much refreshed apparently.

It seems to the writer that the chief reason for the poor showing which the alienist makes on the witness stand and for the tremendous advantage which the cross-examiner has over him is in the fact that medicine is not an exact science itself, especially that branch dealing with mental disorder, but the testimony of the witness is attacked as if the points he made were as susceptible of exact proof as a mathematical demonstration.

It is well known, e. g., that even in the chronic insane many acts are not irrational as such. Thus a patient with marked grandiose and persecutory delusions may yet go to his meals, dress and undress himself, play games, etc. Suppose the doctor to be cross-examined about such a patient, we might suppose the district attorney to ask:

"You say So-and-So is insane; now, isn't it a fact that he dresses himself neatly every morning? He doesn't put his trousers on his arms and his coat on his legs, does he, doctor? When it is meal time he goes to the dining room, he doesn't go to the sitting room, does he?" etc.

Again, the prosecutor may ask you what "pathology" you have found, especially if you have defined insanity as a disease of the brain. He will ask you if there can be any disease without a pathological process. If you have found any pathological process; if you have not he will ask you how you can say insanity exists if you have found no disease of the brain.

The most common attack in cross-examination is by attacking individually each symptom quoted by the doctor in giving his reason for thinking the accused of unsound mind. This is quite effective and exasperating, its effectiveness lying in the fact that mental disorder is, speaking broadly, not demonstrable in any examination of the

patient at one time, nor in any single act committed by him, but in a broad view of his conduct over a certain period of time or in the circumstances and setting, say, of his criminal act.

In other words, the conclusion to which an alienist comes, especially when his opinion is based on a hypothetical question, is after all the result of a process of inductive reasoning which automatically lays itself open to the attack that all the facts were not known.

The doctrine of probability, too, which lends strength to the opinion, is not available when the symptoms are taken up singly. Thus the prosecuting attorney may take a single act, quoted by the alienist, out of its setting and force the physician to admit that of itself it is not necessarily an insane act or a symptom of insanity. Then he may say: "In other words, doctor, you have admitted that this is not a symptom of insanity; in other words, that it means nothing. Now, one thousand times nothing is still nothing, isn't it?" Which is perfectly true, mathematically speaking, but in medicine the whole is sometimes greater than the sum of all its parts. What is not brought before the jury is that a man may perform one bizarre action and still be sane; if he does two, we think of mental disorder, three or four still more so and with every additional symptom the probability increases in geometrical proportion, so that we feel justified in giving an opinion of unsoundness of mind based on a series of abnormal actions, while we cannot swear that each act taken by itself is evidence of insanity, or, as it is frequently put, "Would it be possible for a person of sound mind to do it."

Speaking of abnormality reminds me of the trap of definition into which I earnestly adjure psychiatrists not to fall. Thus at one trial several hundred people wasted one golden hour, set with sixty diamond seconds—as the copy books used to say—trying to get an expert to define a normal person, which he held, very properly, was impossible.

Of course, the crux of the legal situation is, after all, whether or not the defendant knows right from wrong and when the physician has replied in the negative he is liable to be bombarded with questions tending to show that the defendant attempted escape or concealment after his crime. Thus the mere automatic flight after a murder and the instinctive avoidance of people are held to be evidences of the existence of a realization of guilt.

Having once gotten the physician to say the accused was irresponsible on the day of his crime, the prosecutor naturally quotes various things he did in a perfectly rational manner on that day, including perhaps the preliminaries of the crime itself. Thus, if the accused picked up an iron bar, he will ask, "Doctor, when the accused picked up an iron bar, did he know it was iron?" "When he struck his victim, did he know he had killed him?" "Was picking up an iron bar and not a lead pencil evidence of sanity or insanity?" etc. If the doctor states he does not know what was in the accused's mind he is met with, "Why, doctor, how can you come into court here and pretend to tell this jury what was the state of the mind of the defendant when you admit you don't know it?"

Another method of attack, used especially where the diagnosis has been based partly at least on the accused's own story, is to ask:

"Doctor, did you believe So-and-So when he told you that?"

If you say you did believe him, he will say, "Now, doctor, the accused knew he was in danger of his life. Do you think that would make any difference in his story?" or "Doctor, you say you knew he was insane and yet you believed everything he told you. Do you always believe everything an insane person tells you?"

If the physician says he did not believe everything, but only parts of his story, the

prosecutor says, "Oh, you pick out the parts you want to believe and reject the rest, do you?"

In this connection, the witness is of course asked how he knows the accused is not malingering, or how far the replies were suggested by his questions. If the accused contradicts himself in the course of two examinations the doctor is asked which he believes and why. If he recalls something at the second examination he could not at the first he is asked if his memory is better then or if he has only made up a new lie.

Time will not permit of the discussion of hypothetical questions, but they are of course attacked by dropping each part of them in turn and saying, "Now, suppose we leave that out, would that affect your opinion?" The unwary witness may thus see four or five of his symptoms dropped and then become uneasy at their dwindling, say when it is suggested that the next symptom be elided, that he would then change his opinion. This gives the cross-examiner his opportunity. He says, "In other words, you wouldn't call him insane without this symptom (or act), but you would with it?" This focuses an undue attention on this particular symptom and it is attacked intensively, with the result that if the witness is obliged to admit that it is not in itself indicative of insanity it seems to the jury as if he had abandoned the one thing he emphasized.

The counter-hypothetical question is of course constructed by leaving out parts of the hypothetical question which the prosecutor believes he can disprove, by putting in acts showing no abnormality and by giving motives for acts which seem purposeless in the hypothetical question. The chief defense against this is to say that the question does not give enough material to form an opinion on, just as the physician should say, when questioned about the meaning of a certain act quoted by the prosecutor to show rationality, that it does not of itself indicate either sanity or insanity. The physician will be forced to admit probably that he cannot diagnose insanity from the counter-hypothetical question. This, as will be seen, puts the matter in a false light. The jury is only allowed to see certain acts and statements or selected parts of a life history and are told that the *eminent alienist* can find nothing in them to indicate insanity. In other words, the insane person in a day may do ninety things which are not unusual or eccentric, but the sane person does not commit ten absurd actions in a day.

As suggested above, there are many aspects of the matter which are here omitted. Other subjects open too wide a field of speculation, e. g., the question as to whether or not there should be a doctrine of partial responsibility. However, I have only given some high lights which may be of reminiscent interest to those who have been through the mill and serve as danger signals to those who seek experiences of this sort under the impression that alienists receive big fees for a little pleasant work.—Reprint Journal of Criminal Law and Criminology.

A forgetful squire in a small New Hampshire town was in the habit of carrying about with him a slip of paper upon which were written the words of the marriage ceremony. He would not trust his memory on the subject and the few dollars he received in fees helped marvelously in the annual income.

One day, however, at a county fair, he was approached by a couple who wanted to enter the holy bonds and discovered to his horror that he had left the formula at home. Nevertheless he put a brave front on it. "You wanter merry this young woman?' he asked the groom. "I do." "Young woman, you wanter marry this feller?" "I do." "Then," with a sigh of relief: "I pronounce you man and wife accordin' to the memorandum I must have left at home in my other pants pocket."

MASTER AND SERVANT—CHAUFFEUR OF HIRED AUTOMOBILE.

GROTHMANN v. HERMANN.

241 S. W. 461

St. Louis Court of Appeals, Missouri, May 2, 1922.

Where defendant, a funeral director, hired an automobile from another to use at a funeral, and the chauffeur of the hired automobile in closing the door of one of defendant's automobiles caught plaintiff's hand and injured it, defendant was not relieved from liability on the ground that the one from whom he hired the automobile was an independent contractor, since the chauffeur, was subject to defendant's directions.

Conrad Paeben, of St. Louis, for appellant.

George A. Davies and Arthur E. Simpson, both of St. Louis, for respondent.

NIPPER, C. Plaintiff, an infant, sues by next friend to recover for personal injuries sustained by her while boarding an automobile at St. Peter's Cemetery, in St. Louis county, Mo. The suit was brought against the appellant and two other defendants.

At the trial in the court below, at the close of plaintiff's case, the court directed a verdict in favor of all the defendants, and plaintiff suffered an involuntary nonsuit. On motion to set aside the nonsuit, the court sustained the motion as to defendant Hermann, and overruled it as to the other defendants. From this judgment the defendant Hermann appeals.

The negligence alleged in the petition is that, while plaintiff was in the act of getting into an automobile, and having placed her right hand against the doorframe thereof to steady herself, a certain agent and servant of the defendants, in pursuance of his employment, endeavored to shut the door of said automobile, and negligently and carelessly slammed the door before plaintiff had boarded said automobile, and while she was in the act of doing so, and caught the fingers of plaintiff's right hand between the door and the doorframe, injuring her.

The answer of the two defendants other than appellant was a general denial. Defendant Hermann answered by denying specifically that plaintiff was a passenger in an automobile owned and controlled by him, or that a certain agent and servant of his, in pursuance of his employment, endeavored to shut the door of an automobile owned and controlled by him, and further denied generally every allegation in plaintiff's petition.

It appears that Hermann, the appellant here, was an undertaker and liveryman, and was hired by respondent's uncle, Henry Grothmann, to conduct and direct a funeral of plaintiff's grandmother. Pursuant to such employment, Hermann embalmed the body, furnished the casket and hearse, and was present at the house from which the funeral was held, and at the cemetery during the funeral services and burial, directing and supervising affairs at both places. Grothmann knew nothing about the other defendants' furnishing any limousines or chauffeurs. Hermann not having sufficient limousines of his own available, hired some from each of the other two defendants, the other defendants being the Donnelly Undertaking Company, and the Wacker-Helderle Undertaking Company. The two last-named defendants furnished limousines with chauffeurs, for which they were paid by Hermann. The day was very cold, and Hermann directed the mourners to return to the limousines while he placed flowers on the grave of the deceased. Plaintiff and her sister thereupon returned to the limousine in which they had been transported to the cemetery. This limousine bechine belonging to Wacker-Helderle Company, As the mourners left the limousines at the cemetery, a chauffeur who had driven a machine belonging to Wacker-Helderlee Company, left his car and went over to and engaged in conversation with the chauffeur of the car in which plaintiff was conveyed to the cemetery. While engaged in such conversation, this chauffeur took a seat beside the chauffeur of the car in which plaintiff had been conveyed to the cemetery. As plaintiff and her sister opened the rear door thereof for the purpose of re-entering the car to return home, the chauffeur who had driven the Wacker-Helderle car opened the front door, alighted from the limousine, and as plaintiff placed her hand near the hinge of the front door, the said chauffeur, after alighting, slammed the front door, catching the fingers of plaintiff's right hand between the door and doorframe, injuring her. The chauffeur of the car in which plaintiff was riding took no part in this transaction in any way.

Defendant testified that he had no control over the operation of the car; that he merely hired the cars and chauffeurs from the other defendants, and the chauffeurs took their places in the line of procession where they saw fit. He says, however, that he conducted the funeral, and directed the route to be followed, but had nothing to do with the operation of the car.

It is the contention of appellant that this judgment should be reversed because the hiring of the automobiles and chauffeurs from the owners did not create the relation of master and servant whereby appellant could be held, the reason for this being that such automobiles and chauffeurs were not under appellant's control. This assignment cannot be upheld under the facts of this case. The rule for determining the question of liability in cases of this kind is quoted and followed by the Kansas City Court of Appeals in Simmons v. Murray (Mo. App. 234 S. W. 1009, in quoting from Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480, wherein it is stated:

"It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men became pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work."

To apply this rule correctly here, we must first inquire whose work was being done by these chauffeurs, and who had the power and authority to control them in the performance of the same. We think there is ample testimony in this record to show that the appellant Hermann had the full power and authority to control the operation of the chauffeurs and cars in question, because they were under his direction and control at the time. If after appellant's employment he had discovered that he would be unable to take charge of this funeral, and had employed either or both of the other defendants to take absolute charge and control, and conduct this funeral in their own way, then a different rule would apply, and an entirely different situation would present itself. Appellant hired the cars and chauffeurs in question from the other two defendants because he did not have sufficient cars of his own available. When they appeared at the places where they were directed and requested to appear, they were then under the direction and control of appellant, and they were subject to his direction and control at the time plaintiff received her injuries, for they were doing his work, and he could not escape liability on the ground that the other defendants were independent contractors, nor upon the ground that the servant was not acting within the scope of his employment at the time plaintiff received her injuries, as this was a question to be determined by the jury under proper instructions.

It follows, therefore, that the action of the trial court in setting aside the involuntary nonsuit as to Hermann, should be sustained. The Commissioner so recommends.

PER CURIAM. The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

ALLEN, P. J., and BECKER and DAUES, JJ., concur.

NOTE—*Liability of Undertaker for Negligence of Driver Furnished by Another.*—Although a contract for carriages for a funeral is made by a member or friend of the family, and the undertaker knows only in a general way the number and names of those who are to be transported, his duty of care exists in favor of each passenger. And where he contracts to furnish carriages for a funeral, he cannot escape liability for negligence of a driver, which results in injury to an occupant, on the ground that he sublet the contract to an independent contractor, if his employers did not consent. John J. Radel Co. v. Borches, 147 Ky. 506, 145 S. W. 155, 39 L. R. A. (N. S.) 227.

An instruction was approved which charged the jury that the defendant, a livery-stable keeper, would not be responsible for the negligence of the driver of a carriage furnished with a team, to an undertaker for use at a funeral, if the defendant had completely surrendered to the undertaker control of the driver so that the defendant could not exercise any control whatever over him; but, on the other hand, that the defendant would be responsible if the engagement of the vehicle and driver simply gave the undertaker the right to direct where the vehicle was to be driven. Hershberger v. Lynch, 9 Sadler (Pa.) 91, 11 Atl. 642.

While cases analogous in fact to the above are few, there are numerous cases analogous in law. Some of the latter may be found collected in notes in 38 L. R. A. (N. S.) 973; 25 L. R. A. (N. S.) 33; 13 L. R. A. (N. S.) 1122.

Mrs. Hoyle—Were you tried by a jury of your equals?

Mrs. Doyle—I should say not; one of the jurywomen had on her last year's hat—Life.

BOOK REVIEW

OUR CHANGING CONSTITUTION

An opportune book is this, prepared by Charles W. Pierson and published by Doubleday, Page & Company, which has just come to hand. -Opportune—because its theme is "Federal encroachment upon State power," a subject which must be of present special interest to every reasoning citizen and interesting because of the nice manner in which this momentous change in our political system is enlarged upon.

The work opens by pointing out the salient feature of the Constitution, the creation of a duel system of government and the division of power effected between the national government and the states. Next is taken up the place of th Supreme Court in the constitutional scheme, the power of the Court to declare legislative acts unconstitutional and the limitations on this power. Continuing, in Chapter III, the change in the popular attitude toward the Constitution is discussed and the causes of the change, such as foreign relations, influence of later immigrants and economic development, with methods by which the change has been put into effect, with resultant diminution of State authority, are brought out.

The Prohibition and Woman Suffrage amendments are then treated, as being an arresting manifestation of this change in our system of government. Says the author, in his discussion of the Prohibition Amendment, "Advocates of the old order see in the change a breaking down of the principle of local self-government. To their minds the danger of majority tyranny, made possible by a centralization of power in a republic of such vast extent and varied interests, outweighs all the advantages of national uniformity and efficiency."

Efforts of Congress to legislate against child labor under the power to regulate commerce and the power to lay taxes are set forth, to demonstrate an endeavor for extension of Federal authority, which leads to an explanation of the consistent manner in which the Supreme Court, subject to its limitations, has defended against encroachment.

The succeeding three chapters concern the taxing power of Congress, as affecting the Income Tax Amendment, particularly in relation to taxation of state and municipal bonds, and the Federal Corporation Tax Act, with a clear explanation of the nice distinction apparently involved in the determination whether such corporation tax is or is not theoretically unconstitutional, although practically affirmed as not by the Supreme Court.

There is presented, in the next chapter, a well expressed statement of federal anti-trust legislation, as a further example of assumption of authority by the Federal government over a subject originally reserved to the states. The Sherman Act receives discussion, its earlier uncertainties and their settlement being brought out. The scheme of federal incorporation, in reformation of such legislation, in view of present economic conditions is incidentally enlarged upon.

The concluding chapter epitomizes those preceding, points out the increasing burden of federal bureaucracy, with the statement that "In the very nature of things there is bound to be a reaction against centralization sooner or later," emphasizes the adequacy of the Constitution to deal with changing conditions and reiterates "that, under our political system, legislation in the nature of police regulation (except in so far as it affects commerce or foreign relations) is the province of the states, not of the National Government."

An an appendix, the work contains the Constitution, with Amendments.

The book is a small one of one hundred and eighty pages, cloth bound and of approximately note size. It contains appropriate citations and quotations by eminent authorities and should be a pleasing addition to your library.

CORPUS JURIS
Volumes 27, 28

The Central Law Journal is in receipt of several volumes of Corpus Juris which the Journal was unavoidably prevented from giving proper mention. Volume 27 and 28 cover the subjects from Fraud to Guardian and Ward. They are, of course, on a par with the usual high standard set by the American Law Book Company for this work. Volume 27 contains 1108 pages, while Volume 28 contains 1322 pages. Volume 27 covers the subjects of Fraud, Frauds, Statute of, Fraudulent Conveyances, Game, Gaming. Volume 28 Covers Garnishment, Gas, Gifts, Good Will, Grand Juries, Ground Rents, Guaranty, Guaranty Insurance, Guardian and Ward. A feature of this work which possibly has not been adverted to heretofore, is a list of words and phrases and also of maxims printed in the first part of each volume with reference to the pages on which they are found. These tables appear immediately after the table of titles of the subjects treated in each volume, and form a very valuable feature of the work.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Arrest**—Copy.—Affidavit on which order of arrest of defendant was procured, the facts stated in which were essential to the order as proof of plaintiff's case, being copy of affidavit purporting to have been made in another action between different parties, the original not being produced or referred to in the application, or disclosed that alleged affidavit was a copy of any original claimed on file, held insufficient.—Horbachewski v. Mikulski, N. Y., 194 N. Y. S. 497.

2. **Attorney and Client**—Jurisdiction.—An attorney has an option to enforce his lien in chancery or to enforce it in the same court in which the judgment was recovered.—Vaughan v. Hill, Ark., 242 S. W. 826.

3. **Auctions and Auctioneers**—Breach of Duty.—Where one was hired at a stated consideration to clerk an auction sale, with the agreement that the bank, of which he was the cashier, would take all paper at 95 cents on the dollar, and where, at the public auction held, a purchaser bought and received certain property without making settlement in accordance with the terms advertised for the sale, it is held, for reasons stated in the opinion, that the clerk was acting under a contract of employment, and that the evidence failed to show any breach of duty, whether impliedly assumed or expressly contracted, by such clerk.—Posey v. Stutsman County Bank, N. D., 189 N. W. 315.

4. **Automobiles**—Burden of Proof.—The burden is on a driver suing for personal injury and damage to an automobile sustained from the fall of a tree limb to prove the injury was caused by negligence of defendants county commissioners—Commissioners of Washington County v. Gaylor, Md., 117 Atl. 864.

5.——Carelessness.—Where one walking through an alley crossed to the other side of the alley and stopped near the sidewalk to speak to one who was standing on the sidewalk, and was struck by a taxicab backing against him, it cannot be ruled as a matter of law that he was careless.—Millay v. Town Taxi, Mass., 136 N. E. 127.

6.——Instructions.—Where obstructions prevented plaintiff, a guest in an automobile approaching crossing at a moderate rate of speed, from seeing a train running 35 miles an hour without signals until the machine was within 30 feet of the track, when he tried to save himself by jumping as the driver attempted to cross, held, that the Court did not err in submitting the case to the jury.—Davis v. Pettitt, Tex., 242 S. W. 783.

7.——Reimbursement.—Where automobile liability policy insured against loss from claims on account of accidental bodily injuries to, or death of, "any person or persons" resulting from the operation of the automobile, assured was not deprived of his right to reimbursement for an amount recovered from and paid by assured for such an injury to a third party, simply because the third party happened also to be a party assured under another paragraph of the same policy, which provided that "the assured * * * shall include the assured named in the declarations and any person or persons while riding in or operating" the automobile with the permission of assured or any adult member of his family.—Union Automobile Ins. Co. v. Samelson, Colo., 207 Pac. 1113.

8.——Tax.—Chapter 461, Laws 1921, took effect April 23, 1921. In requiring the owner of a motor vehicle to pay a tax for the entire calendar year, if he became the owner prior to July 31st, the Legislature did not exceed its powers—Dohs v. Holm. Minn., 189 N. W. 418.

9. **Bankruptcy** — Conditional Sale.—A "trust agreement", providing that one subsequently becoming bankrupt took no title to an automobile, and accepted it in trust as bailee, and agreed to redeliver it to the motor company on demand, the motor company agreeing to sell the automobile to the bankrupt at a price for which the bankrupt gave his promissory note, the trust agreement to be surrendered when the note was paid, was a conditional sale, and not a bailment, and the motor company was not entitled to reclaim it as against the trustee in bankruptcy.—In re Shiffert. Pa., 281 Fed. 284.

10.——Exemptions.—Statutory exemptions are for the benefit of the debtor, and may be waived by him, and, on withdrawal by a bankrupt of the claim to exemptions made in his schedules, the property will not be set apart in favor of a levying creditor who holds a waiver of exemptions.—In re Cross, Pa., 281 Fed 217.

11.——Possession.—A trustee held not to have acquired title to tractors sold to bankrupt, accepted drafts, which were not paid, being taken for the purchase price, where the tractors were not delivered, but placed in charge of another as warehouseman, subject to seller's order, and never, with its consent, came into possession of bankrupt.—In re Bartlett, Ga., 281 Fed. 191.

12. **Banks and Banking**—Assigned Contract.—In action by assignee of installments due on trucks sold highway contractor against a bank, which was supplying the contractor with the money to enable him to perform the contract and had taken assignment of moneys to become due under the contract as security, for breach of the bank's agreement to pay certain amount due on the trucks on contractor's deposit in bank of amount then due from the State under the contract in consideration of assignor's agreement not to retake possession of trucks, evidence held to sustain finding that the bank did not make the alleged promise to pay such sum.—Hesse v. Merced Security Sav. Bank, Cal., 207 Pac. 283.

13.——Federal Reserve Act.—Federal Reserve Act, § 13, as amended by Act June 21, 1917 (Comp. St. 1918, Comp. St. Ann. Supp, 1919, § 9796), providing that any Reserve Bank may receive for exchange or collection checks, notes, bills, etc., gives to the Reserve Banks an option to receive such checks on whatsoever bank drawn, within its district, without discrimination as to whether they are members or non-members, or have availed themselves of the clearing house privileges afforded by the Reserve Bank; but the word "may" is not to be construed as "shall", so as to be mandatory, and the requirement of Section 16 of the act (Section 9799) that the banks receive from member banks or Federal Reserve Banks checks and drafts drawn on their depositors, carries with it no specific power for making exchange or collections.—Brookings State Bank v. Federal Reserve Bank, Ore., 281 Fed. 222.

14.——Felony.—An information charging that defendant, the president of a bank, feloniously put forth specifically described certificates of deposit, without authority from the directors, with intent to defraud the bank, there being no deposits as certified, charges a felony. Rev. St. 1913, § 8658.—Ridings v. State, Neb., 189 N. W. 372

15.——Fiduciary Power.—The Federal Reserve Act, § 2 (U. S. Comp. St. Ann. Supp. 1919, § 9794), allows national banks to act in a fiduciary capacity when the exercise of such power is not "in contravention of state or local law". Gen. Laws 1909, c. 231, §§ 4-8, as to corporations empowered to act in a fiduciary capacity, provides, in Section 6, that the assets of every such company, equal in value to the par value of its capital stock, shall stand primarily as security for trust liabilities in preference to payment of other creditors, and, in Section 7 requires a deposit with the general treasurer of securities amounting to 20 per cent of the capital of such a corporation, to be held as additional security for trust liabilities; and all other corporations than trust companies are excluded from the exercise of fiduciary powers. Held, that since national banks cannot, under their charter and the National Banking Law, comply with said Section 6, it would be "in contravention of state or local law" for such banks to act in a fiduciary capacity and hence mandamus would not be awarded to compel the general treasurer to receive from a national bank the deposit specified by said Section 7.—Aquidneck Nat. Bank v. Jennings, R. I., 117 Atl. 743.

16.——Independent Agency.—In an action by a drawer against a bank, for damages for wrongfully refusing to pay his check drawn upon it, after the payee of the check had informed the bank that the drawer would be arrested unless the check was paid, the subsequent arrest and incidental indignities suffered by the drawer was caused by an independent human agency, and hence was an intervening cause for which the bank was not liable.—Bearden v. Bank of Italy, Cal., 207 Pac. 270.

17.——Saving Deposits.—So-called Christmas club deposits in a trust company, consisting of weekly deposits of uniform amount, made under an agreement that, if the full 50 payments had been made, the amount might be withdrawn on presentation of the customer's book two weeks before Christmas, were savings deposits, and must be so treated in liquidating the trust company upon insolvency.—In re Hanover Trust Co., Mass., 136 N. E. 112.

18. **Bills and Notes**—Consideration.—An existing indebtedness to an amount in excess of the amount of drafts constituted a sufficient consideration for their acceptance, under Gen. Laws, c. 107, § 48.—Owen Tire Co. v. National Tire & Rubber Co. et al., Mass., 136 N. E. 118.

19.——Duress.—Where the fears or the affections of a father for his son are wrought upon by threats of a criminal prosecution of the son, and the father is thereby induced and coerced against his will to execute his promissory note in order to prevent such threatened prosecution, there is duress as to the father in the execution of the note, even though the threatened prosecution be for a crime which has been committed by the son, and such a note is void. Colclough v. Bank of Penfield, 150 Ga. 316, 103 S. E. 489, and authorities cited; Id., 150 Ga. 318, 103 S. E. 490. This is true, athough the prosecution may not have been commenced or any warrant issued for the offender. Civil Code 1910, § 4255; Colclough v. Bank of Penfield, supra; International Harvester Co. v. Voboril, 187 Fed. 973 (1), 110 C. C. A. 311; 9 R. C. L. 717, 718, 719. If there was any contrary holding in Bond v. Kidd, 1 Ga. App. 798, 57 S. E. 944, or in Bond v. Kidd, 122 Ga. 812, 50 S. E. 934, it was mere obiter dictum, and is not binding upon this court.

(a) Whether the father was so wrought upon by threats of a criminal prosecution of his son that he was thereby induced and coerced against his will to execute his promissory note for the purpose of preventing such threatened prosecution is a question of fact, to be determined by the jury.—Epps et al. v. Anderson, Ga., 113 S. E. 27.

20.——Indorser.—In an action on two notes which were indorsed before the money was furnished, it was error to refuse to give an instruction that if it was the intention of defendant to only indorse the notes, and it was so understood by plaintiff, then defendant could be considered only in the capacity of indorser, and would be entitled to all the protection with which the law surrounds an indorser, since the transaction, having arisen prior to the enactment of the Negotiable Instruments Act of 1914, was not controlled by it.—Parham v. Lemacks, S. C., 113 S. E. 70.

21. **Carriers of Freight**—Assignments.—Where a final carrier was to collect freight due on a shipment from a consignee, payment by it to the initial and the intermediate carriers of their part of the freight by operation of law constituted an assignment to the final carrier of the right of the initial and intermediate carriers to recover for the services rendered by them.—Southern California Commercial Co. v. Alberti, Cal., 207 Pac. 1023.

22.——Charges.—The consignor is primarily liable for the carrier's charges, and under Interstate Commerce Act (U. S. Comp. St. § 8563 et seq.) the carrier cannot bind itself to collect the charges from the consignee, and not from the consignor, to permit which would permit discrimination between shippers, which that act was intended to prevent.—New York Cent. R. Co. v. Federal Sugar R. Co., N. Y., 194 N. Y. S. 467.

23.——Rates.—In actions by shippers to recover excessive freight rates collected in violation of the long and short haul clause of Interstate Commerce Act, § 4 (Comp. St. § 8566), it was proper to measure the damages by the difference between the rate collected for the shorter haul and the tariff rate for the longer haul.—Davis v. Parrington, U. S. C. C. A., 281 Fed. 10.

24. **Carriers of Passengers**—Assumed Risk.—In an action for injuries to passenger, who fell through trapdoor in vestibule of train, court properly refused plaintiff's request to instruct that a passenger who undertakes to go from one car to another while the train is in motion does not assume risk of sudden and violent jerks, that are not incident to the ordinary operation; the sudden jerk not being the proximate cause of the injury, though it contributed to it.—Mendelson v. Davis, U. S. C. C. A., 281 Fed. 18.

25. **Commerce**—Stoppage of Trains.—While a state may require adequate local facilities even to the stoppage of interstate trains, yet when local demands are adequately met, the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce.—State v. Public Service Commission, Mo., 242 S. W. 938.

26. **Constitutional Law**—Class.—St. 1919, p. 246, creating a home for and confining fallen women for purposes of reformation, is not invalid as denying privileges and immunities under Const. U. S. Amend 14, even though the act is directed only to women as a class.—Ex parte Carey, Cal., 207 Pac. 271.

27.——Liquor Law.—Laws 1917, c. 147, § 25, providing that the court, in prosecutions for a violation of the liquor law, upon discovering that defendant has been previously convicted of a violation of the act, shall quash the complaint, indictment, or information, and have issued a complaint or information for a second offense, and section 26, providing that the court may suspend sentence for a first offense as long as defendant refrains from violating the act, and that a sentence imposed for a subsequent offense shall not be suspended, but shall be enforced without delay, are not unconstitutional as being an encroachment upon the constitutional powers of the judiciary.—State v. Owen, N. H., 117 Atl. 814.

28.——Tax.—The excise tax of 2 per cent. on net profits of business done in the state the previous year by corporations, laid by Gen. St. 1918, §§ 1391-1405, is not violative of the Fourteenth Amendment, on the ground that the state had no longer jurisdiction of the corporation, for tax purposes, in case of a corporation which had commenced to carry on business in the state after the statute was in effect, but had withdrawn from it before the end of the previous year on the profits of which the tax was laid.—William A. Slater Mills v. Gilpatric, Conn., 117 Atl. 806.

29.——Weights.—Pound, one-half pounds, and exact multiples of one pound, with a tolerance of two ounces to the pound in excess of standard maximum weights, held not shown to be void as unreasonable or as discriminatory or as depriving plaintiffs of the equal protection of the laws.—Jay Burns Baking Co. v. McKelvie, Nebr., 189 N. W. 383.

30. **Contracts**—Postal Law.—Where a property owner contracted to pay a real estate agent a commission for securing a tenant for certain property,

and a lease was made to the United State Post Office Department during the time when, under Postal Laws and Regulations, § 56½, a contract entered into by the Post Office Department must contain a covenant that the contractor had not employed a third person to solicit or obtain the contract in his behalf, and all money payable to the contractor was free from obligation to pay any other person for services rendered in the procurement thereof, a commission for securing a contract could not be collected, regardless of the fact that amendments adopted subsequent to the contract would permit commissions to be paid to bona fide established real estate agents for securing such contracts.—Steffey v. Bridges, Md., 117 Atl. 887.

31.——Reasonable.—A contract "to clean down thoroughly all the front and side of defendant's building" did not require the contractor to remove stains in the stonework which were several inches in depth.—Krauth v. Harris, N. Y., 194 N. Y. S. 526.

32. **Corporations**—Act of Corporation.—A contract, purporting to be executed by a corporation, is the act of the corporation when the corporate name is subscribed thereto by an officer of the corporation having authority to execute the contract and bind the corporation, even though the officer attaching the signature of the corporation does not attach his name thereto or indicate in any manner that the signature of the corporation was attached by any person having authority to attach it. If the contract was in fact executed in behalf of the corporation by one having authority so to do, this fact may be shown by parol. A suit thereon against the corporation by the other contracting party is not subject to special demurrer upon the ground that it does not appear that the party signing in behalf of the corporation by affixing his initials thereto did not appear to be an individual having authority so to do, when it is alleged in the petition that the party affixing the initials was a named individual, who was an officer of the corporation, and as such had authority to execute the contract in behalf of the corporation.—Oglesby Grocery Co. v. Puyallup & Sumner Fruit Growers Canning Co. (No. 12802), Ga., 113 S. E. 64.

33.——Charter.—The purpose of Business Corporations Law, § 2, subd. 3, requiring the certificate of incorporation to state the amount of capital stock, and, if any portion be preferred stock, of the preference thereof, was to enable prospective purchasers of stock to ascertain from an official record just what their rights would be before they invested in the shares, and a certificate which stated that a portion of the stock was to be preferred, and to be entitled to preference in the distribution of the assets of the corporation, but stated that the dividends on the preferred stock should be those fixed by the by-laws of the corporation, did not comply with the requirement, and the Secretary of State was justified in refusing to file it.—People v. Lyons, N. Y., 194 N. Y. S. 484.

34.——Demand.—The general rule is that, where an action is brought by a stockholder against a corporation and other defendants to set aside illegal transfers made by it, plaintiff is required to allege first a good cause of action in favor of the company, of which he is a stockholder, and facts which authorize his intervention and the institution of his suit on behalf of his corporation, but where facts are alleged showing that demand on the corporation or directors that it commence an action would be unavailing allegation of a demand is unnecessary.—Security Trust Co. v. Pritchard, N. Y., 194 N. Y. S. 486.

35.——Trustees.—Under Rev. Code 1919, § 8781, providing that a corporation must adopt by-laws for its government, where a corporation had not adopted by laws, and its charter gave its trustees power to control all the business of the association and to direct its affairs, except they were not permitted to make deeds and contracts in relation to land unless authorized in writing by the majority of the members of the association, in an action by a real estate agent against a corporation for a commission for finding a purchaser for land, admitting evidence that the trustees had no power to hire an agent to sell the land without the consent of the majority of the members of the corporation and instructing that none of the officers had authority to employ the agent without approval of the majority of the members of the corporation was error, since, in absence of a requirement in the charter, a formal meeting of the trustees was not necessary to make a binding contract to pay an agent a commission for finding a purchaser for land.—Stablein v. Hutterische Gemeinde, S. D., 189 N. W. 312.

36. **Damages**—Verdict.—A verdict of nominal actual damages will support a verdict for punitive damages.—Edelman v. Wells, Mo., 242 S. W. 990.

37. **Electricity**—Crossed Wires.—The maintenance by a power company of a telephone wire on its power poles without the clearance required by the Railroad Commission at a crossing above a telegraph wire of plaintiff was the proximate cause of damage to plaintiff resulting from a high-tension current transmitted to his telegraph wire through the telephone wire, regardless of the cause of the short-circuiting elsewhere of the telephone wire with the defendant's high-tension line.—Morris v. Sierra & San Francisco Power Co., Cal., 207 Pac. 262.

38. **Executors and Administrators**—Attorney.—Amendment to Code Civ. Proc. § 1616, providing that an attorney for an administrator or executor on notice to the interested parties may apply for and obtain an order that his compensation be paid by the executor or administrator out of the estate in his hands, does not prevent the executor of an estate from employing an attorney other than the one designated in the will, since the executor is liable for acts of the attorney.—Highfield v. Bozio, Cal., 207 Pac. 242.

39. **Frauds, Statute of**—Material and Labor.—"Contracts for goods not in esse at the time, and of a peculiar character so as to be unsuited to the general market, to be made by the work and labor and with the material of the vendor, at the instance of the purchaser, are not within the * * * statute of frauds."—Schreiber v. Wolf, Ga., 113 S. E. 53.

40.——Release—An agreement to surrender a lease which has 15 years yet to run is within the statute of frauds.—Commissioners of Lewes v. Breakwater Fisheries Co., Del., 117 Atl. 823.

41. **Garnishment**—Sovereign Power.—The United States Railroad Administration was not subject to garnishment, being a part of the sovereign power.—State v. American Surety Co., Mo., 242 S. W. 983.

42. **Highways**—Traveled Part.—The traveled part of the road as that expression is used in the statute may be in the center or on either side of the highway as laid out.—Lahiff v. McAloon, Minn., 189 N. W. 435.

43. **Insurance**—Demand.—To give rise to a cause of action against a life insurance company for the statutory penalty and attorney fees (Rev. St. Art. 4746) for failure to pay a loss within 30 days after demand, such demand must be for the amount due under the policy and no more; the company not being required to take any action until a just demand is presented to it.—National Life Ins. Co. of U. S. A. v. Mouton, Tex., 242 S. W. 782.

44.——Intent—.It being a question of fact whether or not the injuries received by the insured were the result of an intentional act of a third person, the Court properly refused to charge to the effect that the insurer would not be liable, although the injury received was different in its nature and effect from the one intended by the person assaulting the insured.—Travelers' Protective Ass'n. of America v. Clarke, Ga., 113 S. E. 41.

45.——Shipping.—Under a contract of marine insurance the insured may recover for the loss of the vessel by sinking without showing specifically what caused her to sink or that she sank as the result of an encounter with a peril of the sea covered by the policy. When he produces evidence that the vessel was seaworthy at the inception of the risk, had been put in repair and passed an inspection recently made, was well rated by the America Bureau of Shipping, and behaved well on previous voyages, but suddenly sprang a leak, a jury may reasonably infer that the vessel was lost by a peril insured against, although unable to ascertain from the evidence what such peril was.—Massey S. S. Co. v. Importers' & Exporters' Ins. Co., Minn., 189 N. W. 415.

46.—Warranty.—In a burglary insurance policy, a subsection providing that the insurer's liability for loss of silks, furs, etc., should be limited, which was printed and which referred to a warranty as

containing a description of the goods covered by the policy, in which warranty the goods were described as woolen goods, in view of another warranty describing the business of the manufacturer as skirt manufacturer, woolen, did not render the insurer liable for the loss of silk goods.—Aetna Casualty & Surety Co. v. Gerber, Md., 117 Atl. 856.

47. **Intoxicating Liquors**—Description.—When the general term "intoxicating liquor" is used, and a particular kind of liquor is named under a videlicet, proof of another kind of intoxicating liquor is not a fatal variance; the naming of the precise kind of liquor not being an essential part of the description of the offense.—State v. Fellis, Idaho, 207 Pac. 1074.

48.——Intention.—Acts 1921, No. 324, forbidding the making of mash, wort, or wash "fit for" distillation of intoxicating liquors, meant that the wash was intended for use in making alcoholic liquors and not as merely meaning a mash which is adapted to or capable of being used for that purpose.—Neal v. State, Ark., 242 S. W. 578.

49. **Joint Stock Companies and Business Trusts**—Individual Liable.—Where the articles of association are in the form of a declaration of trust giving full control to the stockholders, under Vernon's Sayles' Ann. Civ. St. 1914, Art. 6153, imposing individual liability on stockholders of unincorporated associations, the stockholders and trustees were individually liable for association's debts.—Howe v. Wichita State Bank & Trust Co., Tex., 242 S. W. 1091.

50. **Landlord and Tenant**—Lease.—Where defendant signed a lease, to take effect at a future date, and plaintiff's agent signed a memorandum stating that defendant signed the lease on condition that the owner should make certain repairs, and, if owner refused to do so, the lease would be returned, such papers constituted an offer personally made by defendant to plaintiff's agent, contemplating an acceptance.—L. & M. Holding Co. v. Karp, N. Y., 194 N. Y. S. 476.

51.——Reversion.—A sale of the landlord's estate in the leased premises, under a decree for partition, transfers only the reversion, creating the relation of landlord and tenant between the purchaser and the tenant.—Whitener v. Ward, Mo., 242 S. W. 991.

52. **Licenses**—Engaged in Business.—Motor vehicle used by municipal water district in collecting and distributing water to the public without profit is not subject to license as being "engaged in business", under Motor Vehicle Act, § 2; the term being used therein in the narrower meaning applicable to ocupations or employment for livelihood or gain, and to mercantile or commercial enterprises.—Marin Municipal Water Dist. v. Chenu, Cal., 207 Pac. 251.

53.——Owner of Stock.—The so-called Blue Sky Law does not prohibit a person who is the absolute owner of stock issued by a company which does not, either itself or through others, engage in the business within this State of selling its stock or securities, from selling such stock.—Gutterson v. Pearson, Minn., 189 N. W. 458.

54.——Plumbing.—Plumbing ordinance of city of Dallas imposing the requirement of a reasonable examination upon those desiring to do plumbing work in the city is not invalid for not providing for the doing of certain work that requires no technical skill under the direction of master plumbers by persons who are skilled in a particular branch of plumbing, but who are not skilled plumbers, and who are therefore unable to pass a reasonable examination covering the whole field of plumbing, is not unreasonable because it does not undertake to provide distinct, minute regulations and requirements for examinations as to particular kinds of work comprehended within the plumber's trade.—Trewitt v. City of Dallas, Tex., 242 S. W. 1073.

55. **Limitation of Actions**—Demand.—Where a promise to pay money is payable on demand, the statute of limitations begins to run at the date of its execution.—Clunin v. First Federal Trust Co., Cal., 207 Pac. 1009

56. **Master and Servant.**—Insurer.—G. L. c. 152, § 18, providing that, if an insured person contracts with an independent contractor to do such person's work, etc., compensation shall be paid the contractor's employees, does not apply to independent contractors employed by cities, in view of Sections 69-75, extending the act to laborers, workmen, and mechanics employed by cities, etc., and Section 1 (7), defining "insurer" as one insuring the compensation payable by an employer under that statute.—Saxe's Case, Mass., 136 N. E. 104.

57. **Municipal Corporations**—Improvements.—Where the city at its own expense improved a street by the construction of a concrete foundation covered by an asphalt surface, the assessment against the abutting owners of the cost of work done five years later in resurfacing the street was proper, under Ky. St. §§ 3449, 3455, authorizing such an assessment for improvements, but not for repairs, as the resurfacing of this street was an improvement, and not a repair, as to property owners who had paid no part of the cost of original construction.—Southern Bitulithic Co. v. Sweeney, Ky., 242 S. W. 846.

58.——Ordinance.—That a municipal ordinance was not recorded by the town clerk in the book marked "Ordinances" as provided by Rem. Code 1915, § 7744, did not render it invalid, and its due passage could be proven by the introduction of the original ordinance itself, which was signed by the mayor and attested by the clerk as provided by Section 7734.—De Von v. Town of Oroville, Wash., 207 Pac. 231.

59. **Negligence**—Firemen.—The owner of a mill in the country, inviting experienced city firemen under the direction of the chief to help put out a fire in a shed thereof, is under no duty to warn them of a large heavy iron pipe on the roof; it being something that a casual observance would disclose, if it was not concealed by the smoke, and heavily burdened roofs being a thing that experienced firemen should expect to encounter.—Buckeye Cotton Oil Co. v. Campagna, Tenn., 242 S. W. 646.

60.——Warning.—Where the floor of an express office was greasy, sloppy, and slimy from having been recently washed and sufficient time not having elapsed for it to become dry, it was a question for the jury whether, in the exercise of reasonable care for those rightfully on the premises, the proprietor should have given them some warning to prevent injury.—Judson v. American Ry. Express Co., Mass., 136 N. E. 103.

61. **Partnership**—Unincorporated.—Where, in an action by seller for the price of lumber sold to defendants, who had associated themselves together for the purpose of conducting business as a corporation, but had not filed the articles of incorporation with the Secretary of State, defendants were individually liable as partners.—Morse et al. v. Burkart Mfg. Co., Ark., 242 S. W. 810.

62. **Principal and Agent**—Authority.—Buyers cannot escape liability on their contract by naming another party as the actual buyer, without showing that there was such a party and that they were authorized to act for him.—Cipolla v. Scerno, N. Y., 194 N. Y. S. 440.

63.——General Allegation.—Where an agency is alleged, a general allegation is sufficient without averring that the agent had authority to act in the premises; that being regarded as an averment of a conclusion of law or an unnecessary repetition.—Kjerschow v. Daggs, Ariz., 207 Pac. 1089.

64. **Railroads**—Interurban Railway.—The railroad fencing act (Acts 1891, c. 101), requiring "railroad" companies to fence their tracks, applies to an electric interurban railway operating under a commercial railroad charter granted under Shannon's Code, § 2412, as a carrier of both freight and passengers transported along a private right of way of its own.—Union Traction Co. v. Anderson, Tenn., 242 S. W. 876.

65.——Negligence.—Where a railroad engine with steam up was left in charge of a watchman whose other duties carried him away from the engine, and during the watchman's absence someone opened the throttle, causing the engine to run off the track into plaintiff's wagon, the railway company was guilty of negligence, as under the circumstances the engine was a dangerous agency, and a constant watch should have been kept over it.—Missouri Pac. R. R. Co. et al. v. Geren et al., Ark., 242 S. W. 828.

66. **Rescue**—Force.—Criminal Code, § 143 (Comp. St. § 10313), making it an offense to rescue and set at liberty a person convicted of an offense and

ordered committed, applies only to a forcible rescue, and not to an evasion of punishment by a convicted defendant, who was on bail, by procuring another to serve his sentence for him.—Biskind v. United States, U. S. C. C. A., 281 Fed. 47.

67. **Sales**—Breach of Contract.—In a suit upon promissory notes executed by the defendant to the plaintiff in payment of the purchase price of the goods sold by the plaintiff to the defendant, the defendant may by counterclaim recover from the plaintiff damages sustained by the defendant by virtue of the breach by the plaintiff of a written contract between the parties whereby the plaintiff covenanted to keep the property sold insured against fire in a certain amount for the defendant's benefit, with loss to be applied to the unpaid purchase money, and payable to the plaintiff.—Pioneer Mercantile Co. v. Freeman, Ga., 113 S. E. 21.

68.——Place of Delivery.—In buyer's action to recover price paid, the corn having been rejected for quality, evidence of a sample of the corn and testimony showing its condition at M. was properly excluded, where under the terms of the sale contract the weights and grades were to be determined at destination, N.—Bower-Venus Grain Co. v. Norman Milling & Grain Co., Okla., 207 Pac. 297.

69.——Quantity.—Where seller sent buyer a list of goods to be sold, including items of 270,000 pounds of steel car axles listed in column headed "estimated quantity about", accompanied by letter stating that quantities stated were only estimated and might vary "very considerable", without offering to bind itself to deliver all of the steel axles on hand, contract created by buyer's bid of "$45 per net ton", and acceptance thereof, held void for indefiniteness as to amount; it being the seller's intention to prevent a binding obligation on its part to deliver any definite quantity.—George W. Jennings, Inc., v. Hirsch Rolling Mill Co., Mo., 242 S. W. 1003.

70. **Street Railroads**—Negligence.—An emergency created by the negligence of a motorman, such as the operation of a car at an excessive rate of speed, does not excuse him from ringing the bell.—Neff v. United Railroads of San Francisco, Cal., 207 Pac. 243.

71. **Use and Occupation**—Crops.—Since the land in controversy was occupied and cultivated with the tacit consent of appellant, he has no right to recover from respondent the value of the crops, but, in any event, can recover no more than the reasonable rental value of the land.—Call v. Coiner, Idaho, 207 Pac. 1076.

72. **Vendor and Purchaser**—Acceptance.—Where a contract for the future sale of property provides that the title to the premises is to be merchantable and is to be approved as such by the attorney for the purchaser, the question on a suit for the recovery of a deposit made by the purchaser on such a conditional agreement for purchase and sale is not whether the title is good or bad, but whether it has been thus rejected capriciously and in bad faith. City of Rome v. Breed, 21 Ga. App. 805, 95 S. E. 474.—Kenney v. Walden, Ga., 113 S. E. 61.

73.——Immaterial Representation.—A representation by the vendor that the farm had been used for dairy purposes for 12 years was immaterial if false, and does not entitle the purchaser to defeat recovery on the purchase-money notes.—Osborne v. Howard, Ky., 242 S. W. 852.

74.——Title.—The term "merchantable title" means the same as "marketable title", and while a marketable title may be shown by ex parte affidavits, which connect up the showing made by the record title, as by showing the heirs, where the record title rests in one deceased, change of name by marriage, or that a person was single at time deed was executed, the affidavits must serve to explain defects in the record title, and not to change the record title; and hence affidavits cannot establish the identity of grantor and grantee in a case where the abstract shows a conveyance to Ida M. Smith and the next conveyance by Amy A. Smith.—Reeves v. Roberts, Mo., 242 S. W. 956.

75. **Wills**—Contract.—The fact that one has made a binding contract to leave to another all the property remaining to him at his death does not prevent his making a later valid contract that a tract of land then owned by him shall upon his death go to a different person in consideration of his caring for him during the rest of his life. The first contract has relation to the property, which up to the time of his death remains subject to his disposal, and the use in good faith of a particular piece of property, although comprising practically his entire estate, to secure his maintenance during his life, withdraws it from that category. Even if a will is made devising the tract in pursuance of the second contract, the person named as devisee acquires his rights with respect thereto through the contract; the devise serving merely to transfer the formal legal title in accordance with the agreement.—Smith v. McHenry, Kan., 207 Pac. 1108.

76. **Workmen's Compensation Act**—Course of Employment.—Where a night watchman, whose work began at 6 p. m., went to premises of his employer at 3 p. m., to receive pay, and at 5 p. m., while walking to a shanty used in connection with his employment, was injured, held that the injury occurred in the course of his employment within the Workmen's Compensation Act (Pa. St. 1920, §§ 21916-22112).—Carlin v. Coxe Bros. & Co., Pa., 117 Atl. 405.

77.——Employee.—A brick mason, employed by a building contractor furnishing all the materials to build fireplaces of a specified size, who furnished his own tools and engaged the men working with him and charged only union scale of wages and the usual foreman's fee, held an "employee" within the Workmen's Compensation Act, and not an independent contractor.—Jensen v. Industrial Accident Commission, Cal., 207 Pac. 1019.

78.——Independent Contractor.—A carpenter injured while surfacing floors with his own machine under a contract with a building contractor, who had no control over the work except to accept or reject it, held an independent contractor and not an "employee" within Workmen's Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, Arts. 5246-1 to 5246-91) Art. 5246-82, defining an "employee" as one in the service of another under a contract of hire, though he was on the pay roll for labor and was subject to discharge.—Western Indemnity Co. v. Shannon, Tex., 242 S. W. 774.

79.——Injuries.—The Workmen's Compensation Act does not cover injuries resulting to the muscles and nerves through a too long continuance at a task that is too heavy for the employee, and where there is no sudden or violent event producing at the time injury to the physical structure of the body.—Young v. Melrose Granite Co., Minn., 189 N. W. 426.

80.——Partnership.—Where the business of a partnership is such as comes within the provisions of the Workmen's Compensation Law of this State, which compels the partnership to comply with the provisions of the law requiring it to provide compensation for its injured employees by furnishing insurance in one of the ways provided for in the act, which was done by the partnership by contracting with an insurance company for that purpose, and where the partnership was composed of four members, who were the sole employees of such partnership in carrying on its business, and one of whom happened to be accidentally injured under the circumstances that would entitle an employee who was not a member of the partnership to compensation, likewise entitled the injured partner to compensation where the four members of the partnership performed all the labor incident to its business and did not hire other employees to perform the labor, and where each member of the partnership drew the same wage, which was paid from the earnings of the partnership, and the net income from the business of the partnership was equally divided between the four members thereof, the Industrial Commission was correct in holding that such injured employee was entitled to the compensation provided by the schedule of the act, and the order of the Commission awarding such compensation should be affirmed; and it is so ordered.—Ohio Drilling Co. v. State Industrial Commission, Okla., 207 Pac. 314.